United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-7205

IN THE

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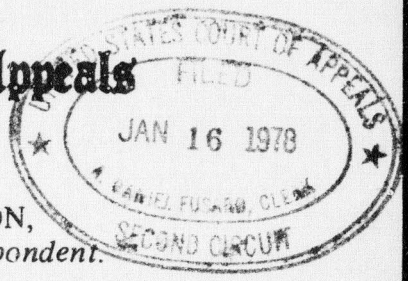

IMAGE CARRIER CORPORATION,
Plaintiff-Respondent.

-against-

ABRAHAM D. BEAME,
Mayor of New York City, et al.,
Defendants-Appellants.

HOUSE OF LITHOGRAPHY, INC., et al.,
Plaintiffs-Respondents,

-against-

ABRAHAM D. BEAME,
Mayor of New York City, et al.,
Defendants-Appellants.

PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING EN BANC

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MISCELLANEOUS

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April 12, 1934 . . . . . 2, 3, 5, 6, 7

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PETITON FOR REHEARING WITH A SUGGESTION FOR A HEARING EN BANC

PRELIMINARY STATEMENT

On December 30, 1977, a panel of this Court consisting of Circuit Judges Oakes, Smith and Anderson decided and filed the opinion in the above-entitled case. Circuit Judge Oakes wrote the Court's opinion in which Circuit Judge Smith joined, reversing the lower court decision of Judge MacMahon which held that the policy followed by the City of New York and several of its constituent agencies of restricting bids for City printing contracts to union printers

denied non-union printers their rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.[1] Circuit Judge Anderson filed a concurring and dissenting opinion in which he contended that the decision of the District Court should be upheld in its entirety.

Plaintffs-Respondents submit this Petition for a rehearing and suggest that this Court convene *en banc* to consider this case.

NATURE OF CASE

This case involves the legality of the City of New York's policy of limiting most City printing contracts to those companies which are authorized to display the union label on their printing. This policy has been in effect since April 12, 1934, when it was promulgated pursuant to an executive Order of Mayor LaGuardia.

The effect of such a restrictive bidding and contracting policy was clearly described by the court below. In a city where the increasing majority of printing establishments are non-union (350 non-union establishments, 250 union establishments), the policy contained in the 1934 Mayoral Order has had the effect of, *ipso facto*, foreclosing all open-shop printing establishments from bidding upon and being awarded most City printing contracts. This exclusionary policy disqualifies all non-union printing companies from performing City work, notwithstanding the fact that the majority of those nonunion companies, including the four named Respondents herein, are fully qualified to perform the types of printing for which the City normally contracts.

The court below held that Appellants' restrictive bidding and contracting practices were arbitrary and irrational and not reasonably related to any legitimate governmental pur-

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[1]The opinion below is reported at 430 F. Supp. 479 (S.D.N.Y. 1977).

pose. In so holding, the court rejected Appellants' assertions that the restrictive bidding policy served to effectuate New York law requiring the payment of the prevailing wage rate to workers under public contract; to further the City's interest in obtaining work of good quality; and to facilitate the policy of enforcing printers' claims for overtime wages. Accordingly, the court concluded that the City's policy of restricting bidding upon and awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who, therefore, can exhibit the union label, violated the Equal Protection Clause of the United States Constitution.

The Decision of the Panel of this Court

In its decision per Judge Oakes, the majority of the panel of this court reversed the lower court holding that the Appellants' restrictive bidding and contracting policies violated Respondents' right to equal protection under the law as guaranteed by the U.S. Constitution. In so holding, the Majority of the panel found that the Appellants' restrictive bidding and contracting practices rationally promoted the State's interests in fostering and promoting collective bargaining. Having ascertained a legitimate State interest behind the City's policy, the panel went on to conclude that, although the Mayoral Order may be outdated, any re-evaluation of the efficacy of the Order should be through legislative rather than judicial action.

Circuit Judge Anderson filed a strongly-worded concurring and dissenting opinion in which he concluded that the Majority of the panel erred in reversing the judgment of the lower court on the merits. In the opinion of Judge Anderson, the Majority's adoption of the "foster collective bargaining" justification, an argument first made by the Appellants during oral argument, was totally ill-conceived, since at no time, either before or during the proceeding below, did the appellants advance such a justification. Fur-

thermore, he argued, that the record below contained no evidence which would lead to a justifiable conclusion that the challenged restrictive bidding and contracting practices do, in fact, foster collective bargaining. As viewed by Judge Anderson, in the absence of supporting proof for this conclusion, the majority's adoption of Appellants' eleventh-hour justification for their restrictive bidding and contracting policies was totally unwarranted.

Reasons for Granting En Banc Review

1. The Importance Of This Case

The overriding significance of this case to non-union printing companies, their employees, and the people of the City of New York, cannot be too strongly stated. The only question herein presented is the legality of a City contracting policy which openly and admittedly discriminates against open-shop printing establishements within the City of New York, solely because of their status as open shop printers. The exclusion of open shop printing companies from eligibility to bid on public projects, financed through public funds and issued by a tax-supported governmental body, raises basic and fundamental questions concerning the City's right to relegate open shop printing employers to a status of second-class citizenry. This arbitrary classification, which this Court has now countenanced, is particularly disturbing in light of the total lack of evidence in the record below which would tend to provide some rationale for the absolute and total deprivations incurred by Respondents and their employees as a result of the Appellants' discriminatory contracting policies.

As the record below indicates, an increasing number of City printing employees and employers have indicated preference for an open shop employment relationship. Assuming *arguendo* that New York City has a legitimate concern in fostering and promoting collective bargaining, such a concern, nonetheless, must, in compliance with Federal labor policy, preserve for employees and employers alike, the op-

tion to maintain their open shop relationship. In the absence of such recognition by the City, its policy of "fostering" and "promoting" collective bargaining will have been metamorphisized into a policy "foisting" and "promulgating" collective bargaining.

The Majority decision of the panel has done a great disservice to open shop printing employers, their employees and the people of the City of New York, by cavalierly likening this matter to *Lochner v. New York*, 198 U.S. 45 (1905) and *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). The issues before this court's panel were not "apparitions of the past", but rather, important issues which go to the very essence of the employment relationship between thousands of printing employees and their employers in the City of New York.

The fundamental importance of the issues raised by this case and the resulting adverse impact which the Majority opinion inflicts on the plaintiffs, their employees and the taxpayers of the City of New York make this case appropriate for rehearing by the full court.

2. The Majority Erred in Finding that the Mayoral Order and Resulting Practice of Restrictive Bidding and Contracting Practices are Designed to Further the Federal and State Interests in Fostering Collective Bargaining.

A. The Majority's Finding That The Mayoral Order Is A Product of A Legislative or Quasi-Legislative Body Is Erroneous.

The majority of the panel commenced its analysis of the issues involved in this case with a serious factual error. Thus, the majority stated:

> "The controversy arises over a resolution adopted April 12, 1934, by the New York Board of City Record . . ."

The obvious implication from this finding is that Mayor LaGuardia's Executive Order was the end product of the

legislative process. In fact, there is nothing in the record to indicate that the Mayor's Order was anything but what it purports to be, i.e. an Executive Order. No minutes or other documentation reflecting Executive intent were adduced at trial by the Appellants or Intervenors. Indeed, aside from the text of the Mayoral Order itself, there is no other official documentation pertaining to the Order. In light of this absolute dearth of executive history concerning the Mayoral Order, the Majority's characterization of the Order as anything other than an Executive Fiat is ill-founded.

B. The Record Below is Devoid of Any Evidence Concerning the Intended Purpose of the Mayoral Order Except for the Explicit Purpose Contained in the Preamble of the Order Itself.

In his concurring and dissenting opinion, Judge Anderson recognized the fallacy in the Majority's efforts to substitute other legislative purposes for the explicit purpose set forth in the Order itself. Judge Anderson states:

> "The preamble of the Executive Order of April 12, 1934, simply states: 'RESOLVED, that in order to lend the greatest measure of aid and assistance *during the present economic depression* to those citizens of our City engaged in the various branches of the printing industry, the following provision be made a part of each and every contract and open market order issued by the Board of City Record.' (emphasis added) . . . No more expansive legislative history accompanies the resolution; no further explanations of its purposes were offered when subsequent administrations made executive decisions to continue this restrictive practice; and no mention of a desire to promote collective bargaining was ever made in connection with this 'union shop only' policy."

The Majority makes no attempt to challenge these observations. Instead, the Majority attempts to impute to Mayor LaGuardia's Order the legislative purposes behind the New York Labor Relations Act of 1940, passed six years after the promulgation of the Mayoral Order. Such a retroactive transformation of purpose is totally without foundation in the record. In short, there is absolutely no Executive purpose set forth in the record, except that explicitly set forth in the Order itself.

3. The Record Below Does Not Address the Relationship Between Appellants' Restrictive Bidding Practices and the Federal and State Interests in Fostering Collective Bargaining.

In reversing the lower court on the merits, the Majority of this court's panel has rejected findings which were supported by the record below and substituted findings which are without foundation. As Judge Anderson in his opinion correctly points out, there is nothing in the record below which would support the Majority's finding that the Mayoral Order is in some manner rationally related to the State's interest in fostering collective bargaining.

In holding Appellants' restrictive contracting policies unconstitutional, Judge MacMahon placed his reasoning squarely in line with the body of law which holds that where a local government exercises its police power in such a way as to construct classifications of persons, such classifications must be reasonable, not arbitrary, and have a fair and substantial relation to a legitimate governmental objective. *Royster Guano Company v. Virginia*, 253 U.S. 412, 415 (1920); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Eizenstadt v. Baird*, 405 U.S. 438, 446-447 (1972).

Judge MacMahon had before him ample evidence upon which to justifiably conclude that Appellants' union label policy was violative of the Equal Protection Clause. The record is replete with testimony which establishes the irrationality of the Appellants' restrictive bidding policy.

The record clearly supports the finding that the Respondents have the capabilities to perform the type of printing jobs which the City presently restricts to unionized printers (109(a), 135(a), 145(a), 166(a)).[2] Further, representatives of each Respondent testified that their companies routinely perform similar work for both the private and public sector clients. (109(a), 135(a), 142(a)). This evidence forcibly demonstrates the arbitrariness of the City's differentiation between union and non-union printing firms and substantiates that this policy is totally unrelated to any legitimate, articulated state purpose, and, therefore, in violation of the Equal Protection Clause. *McGinnis v. Royster,* 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L. Ed. 2d 282, 289 (1973).

The analysis adopted by Judge MacMahon in his decision below precisely applied the rational basis test. The Appellants were given every opportunity to show how the challenged restrictive bidding and contracting practices in any way furthered a legitimate state interest. Such a showing was not and could not be made. Since the Appellants failed in their efforts to show how their restrictive bidding and contracting practices furthered some identifiable state purpose, the lower court was correct in finding such practices to be violative of the 14th Amendment.

4. The Panel of This Court Erred in Failing To Find That Federal Law Pre-empts Appellants' Restrictive Bidding and Contracting Practices.

The restrictive bidding and contract award practices utilized by the Appellants directly conflict with those rights guaranteed by Section 7 of the National Labor Relations Act. Section 7 of the National Labor Relations Act, in relevant part, specifically provides:

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[2] Numbers in parenthesis followed by the letter "a" reference pages of the Appendix.

> "Employees . . . shall also have the right *to refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 158(a)(3) of this title. (Emphasis added)"

It is conceded by the Appellants that the award of most City printing contracts is restricted to only those companies who are authorized to affix the union label. The Respondents and their employees who have chosen not to join or be represented by a labor organization, are by application of the City's policy, denied the opportunity to bid on projects financed by public tax money, solely because of the employees' exercise of the aforementioned federally protected rights. Indeed, the Majority opinion appears to acknowledge this fact, but attempts to avoid the consequences of its holding by stating that the inhibitive effect on the exercise of such rights is minimal.

In actuality however, effect of the arbitrary restrictive practices is far from minimal. Respondents and their employees are forced to unionize to the deprivation of their employees' federally protected Section 7 rights, if they desire to obtain the economic benefit of being able to perform city printing contracts. Under the Majority's ruling, the only way that non-union printers may perform City printing work is by becoming a unionized employer. Yet federal law prohibits an employer from unilaterally taking such action unless a majority of its employees elect to be represented by a labor organization. Accordingly, the City's policy, conflicting as it does with Federal labor law policy, must be stricken *Hawaiian Telephone v. State of Hawaii, Dept. of L & I Rel.*, 405 F. Supp. 275 (D. Hawaii, 1975); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Machinists and Aerospace Workers v. WERC*, 427 U.S. 132 (1976).

CONCLUSION

For all of the above reasons, the Respondents respectfully request that their petition for a rehearing with a suggestion for a hearing *en banc* be granted, and that the decision and opinion of the panel majority dated December 30, 1977, be vacated.

Respectfully submitted,

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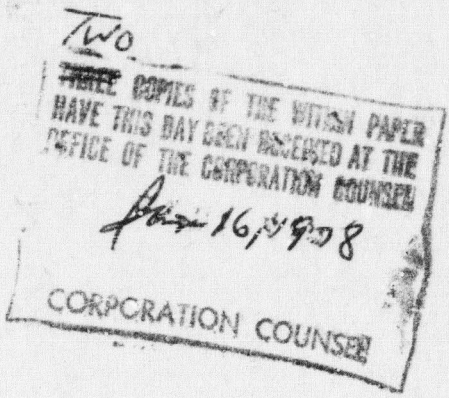
January 13, 1978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